No. 95-809

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LOCKHEED CORPORATION, *et al.*,
Petitioners,

v.

PAUL L. SPINK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. This brief urges reversal of the decision below and thus supports the position of the petitioners.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC has a unique depth of under-

standing of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its association members, are employers subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.* and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.* As employers, virtually all of EEAC's members maintain employee benefit plans and offer early retirement incentive programs. These plans are either adopted at the employer's option or are products of collective bargaining with employee representatives.

As potential defendants to lawsuits under ERISA and the ADEA, EEAC's members are interested in the issues presented in this case; i.e., whether the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, §§ 9201-04, 100 Stat. 1874, 1973-80 (1986) (OBRA), has retroactive application and whether an employer may obtain a release or waiver in connection with an exit incentive or other employment termination program.

The issues presented in this case are extremely important to EEAC's constituency. The Ninth Circuit held that the OBRA amendments apply retroactively. Thus, the court ruled that the OBRA amendments require employers not only to permit employees hired within five years of normal retirement age to participate in pension plans for plan years beginning in 1988, but to retroactively include pre-enactment

service years in calculating accrued benefits. The Ninth Circuit also held that Lockheed violated ERISA by requiring a release of claims as a precondition to participation in an enhanced benefits early retirement program. If either of these rulings are allowed to stand, there will be a susbtantial adverse impact upon employers who maintain employee benefit plans and upon employees who routinely receive enhanced benefit packages in exchange for releasing their employers from potential litigation claims.

The Ninth Circuit's decision that the OBRA amendments have retroactive application is not authorized by the language of the amendments, is in direct conflict with this Court's recent decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), and contravenes the legislative history of the amendments. Moreover, if allowed to stand, the Ninth Circuit's decision will hamper the ability of employers to offer early retirement incentives.

Because of its interest in the application of the nation's civil rights laws, EEAC has filed briefs as *amicus curiae* in cases before this Court, the United States circuit courts of appeals and various state supreme courts, including the *Landgraf* retroactivity case cited above. As part of this *amicus* activity, EEAC has participated in numerous cases before the courts of appeals involving ERISA.[1] Furthermore, a

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[1] *Philadelphia Electric Co. v. Fischer, cert. denied,* 114 S. Ct. 622 (1993); *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133 (1990); *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85 (1983); *General Motors Corp. v. Wells,* 881 F.2d 166 (5th Cir. 1989) *cert. denied,* 495 U.S. 923 (1990); *Nolan v. Otis Elevator Co.,* 505 A.2d 580 (N.J. 1986); *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board,* 359 N.E.2d 393 (N.Y. 1976).

number of other cases in which EEAC has participated have involved ADEA.[2] In addition, EEAC has briefed a number of other employment issues in this Court.[3]

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case, particularly the practical effect that the decision will have on employers and potential beneficiaries of early retirement benefit plans.

STATEMENT OF THE CASE

Underlying Facts. Respondent, Paul L. Spink, worked for Petitioners, Lockheed Corporation, *et al.* (Lockheed) between 1939 and 1950. (Pet. App. at 2a.) Mr. Spink was rehired by Lockheed in May 1979 at the age of 61. *Id.* At the time Mr. Spink was

[2] *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989); *EEOC v. Westinghouse Electric Corp.*, 869 F.2d 696 (3d Cir.), *vacated and remanded*, 493 U.S. 801 (1989), *on remand* 907 F.2d 1354 (3d Cir. 1990); *Raczak v. Ameritech*, No. 95-1082 (6th Cir. Apr. 1995); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 506 U.S. 955 (1992).

[3] *O'Connor v. Consolidated Coin Caterers Corp.*, No. 95-354 (Jan. 31, 1996); *Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); and *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

rehired, the terms of Lockheed's retirement plan (the Plan) excluded him from participating because he was over sixty years of age. *Id.* at 2a-3a.

In 1986, Congress passed the Omnibus Budget Reconciliation Act (OBRA), Pub. L. No. 99-509, 100 Stat. 1874 (1986). *Id.* at 3a. OBRA amended the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and the Internal Revenue Code (IRC), 26 U.S.C. §§ 1 *et seq.*, to bar age discrimination in participation and benefit accrual standards applied by employee benefit plans. *Id.* The OBRA amendments were effective for plan years beginning after January 1, 1988. *Id.*

Pursuant to the OBRA amendments, Lockheed allowed employees hired after age sixty to participate in the Plan after January 1, 1988. *Id.* Mr. Spink became a participant on the first day of the Plan's 1988 plan year. *Id.* at 3a-4a. Lockheed did not credit Mr. Spink with accrued benefits based on his years of service with Lockheed prior to December 25, 1988. *Id.* at 4a.

In 1990, Lockheed amended the Plan, establishing a "1990 Special Retirement Opportunity" (SRO). *Id.* The SRO offered increased retirement benefits to eligible employees as an incentive to terminate their employment. *Id.* The increased benefits were paid out of the Plan's surplus assets. *Id.* In order to partake in the SRO, all Lockheed employees were required to sign a waiver releasing Lockheed from any potential employment related claims they might have against the company. *Id.* Mr. Spink did not elect to

partake in the SRO. *Id.* Mr. Spink retired from Lockheed in June 1990. *Id.*

On February 5, 1992, Mr. Spink filed a complaint in the United States District Court for the Central District of California. *Id.* In his complaint, Mr. Spink challenged the release requirement of the SRO and alleged that the OBRA amendments to ERISA and ADEA entitled him and similarly situated employees to benefits under the Plan calculated on the basis of periods worked before and after January 1, 1988, the effective date of the statute. *Id.*

The district court's decision. Lockheed moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. *Id.* at 5a. The district court granted Lockheed's motion and dismissed the complaint with prejudice. *Id.*

The Ninth Circuit's decision. The Ninth Circuit reversed the decision of the district court. First, the Ninth Circuit held that the OBRA amendments applied retroactively. *Id.* at 8a n.1. The Ninth Circuit also held that by amending the Plan to require a release as a condition of receiving additional benefits to which the participant would not otherwise be entitled, Lockheed engaged in a prohibited transaction under Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D). *Id.* at 14a. A petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit followed.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision is erroneous for two distinct reasons. First, by holding that the OBRA amendments apply retroactively, the Ninth Circuit has acted in contravention of the language of the statute and has ignored the legislative history of the OBRA amendments. Moreover, the Ninth Circuit's holding is in direct conflict with this Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994).

Second, the holding that Lockheed violated ERISA by amending the Plan to condition eligibility for enhanced retirement benefits on a release of claims completely disregarded the edict of the Older Workers Benefit Protection Act which expressly recognizes that an employer may obtain a release or waiver in connection with an exit incentive or other employment termination program. If the Ninth Circuit's decision is not overturned, employers may cease offering enhanced severance benefits to their employees at all. Employers will conclude that the administrative burdens, risks and restrictions on obtaining releases simply outweigh any benefits they provide. The result will be that layoffs will still occur, but without the additional severance benefits offered in the past.

ARGUMENT

I. THE DECISION REACHED BY THE NINTH CIRCUIT, THAT THE OBRA AMENDMENTS APPLY RETROACTIVELY, IS NOT AUTHORIZED BY THE LANGUAGE OF THE AMENDMENTS, IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN *LANDGRAF v. USI FILM PRODUCTS*, AND CONTRAVENES THE LEGISLATIVE HISTORY OF THE AMENDMENTS

A. OBRA Amended ADEA and ERISA to Require Pension Accrual for Employees Working Beyond Normal Retirement Age Only for Plan Years Beginning On or After January 1, 1988

The language of the 1986 OBRA amendments supports the conclusion that they should not be applied retroactively. Section 9201 of OBRA amended ADEA by adding Section 4(i) which requires pension accrual for employees working beyond normal retirement age for plan years beginning on or after January 1, 1988. Section 9202 of OBRA amended ERISA in an identical manner by amending Section 204.

The language of the OBRA amendments expressly states that the amendments apply prospectively. Section 9204(a) provides that the OBRA amendments apply "only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply." § 9204(a), 100 Stat. at 1979. Thus, on its face, the statute does not apply to plan years prior to 1988.

In *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), this Court confirmed that statutes are presumed to apply prospectively "absent clear congressional intent" favoring retroactivity. *Id.* at 1505. Given the absence of clear congressional intent to

apply the 1986 amendments retroactively, and statutory language specifically stating that years previous to 1988 are outside the reach of the Act, years prior to 1988 must be exempt from pension accrual.

B. The Legislative History of the OBRA Amendments Makes Clear that the Legislation Does Not Apply to Years Prior to 1988

The legislative history of OBRA substantiates that Congress did not intend the amendments to apply retroactively. With respect to the impact of the OBRA amendments on ADEA, House Conference Report No. 99-1012 provides:

> It is the intention of the conferees, in adopting the amendments to ADEA (new § 4(i)), that the requirements contained in § 4(i) related to an employee's right to benefit accruals with respect to an employee benefit plan (as defined in section 3(2) of ERISA) shall constitute the *entire extent* to which ADEA affects such benefit accrual and contribution matters with respect to such plans on or after the effective date of such provisions (as described in the provision). No inference is to be drawn by the addition of section 4(i) as to whether or to what extent employee benefit plans might have been required to provided benefit accruals or allocations to employees' accounts for employees protected under ADEA prior to the effective date of section 4(i).

H.R. Conf. Rep. No. 1012, 99th Cong., 2d Sess. 382 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3868, 4027. This language is the antithesis of an intent to apply OBRA retroactively. Moreover, with respect to the effective date of the OBRA amendments, House Conference Report No. 99-1012 provides, "The conference agreement clarifies that the amendments apply

to plan years beginning on or after January 1, 1988." *Id.*

Each of these statements confirm that Congress did not intend the OBRA amendments to have retroactive application. By stating no view on pension accrual or allocations "prior to the effective date of section 4(i)," and then explicitly making the effective date of the statute January 1, 1988, the House Conference Report substantiates that the OBRA amendments do not apply to plan years before 1988.

C. Retroactive Application of the OBRA Amendments Would Be Manifestly Unjust

In addition to the compelling reasons set forth above—retroactive application of the OBRA amendments is not authorized by the language of the statute, is in direct conflict with this Court's decision in *Ladgraf*, and contravenes the legislative history of the OBRA amendments—common sense dictates reversal of the Ninth Circuit's decision. Specifically, retroactive application of the OBRA amendments would impose burdensome and inequitable results on employers.

In *Arizona Governing Committee v. Norris*, where the Supreme Court considered the constitutionality of Arizona's voluntary pension plan, this Court ruled that the plan violated Title VII, yet refused to approve an award of retroactive relief. 463 U.S. 1073 at 1106 (1983). The Court declined to impose retroactive relief on the grounds that such relief "would be both unprecedented and manifestly unjust." *Id.*

By rejecting the notion of retroactive relief under these circumstances, the Court correctly acknowledged that "a retroactive remedy would have had a

potentially disruptive impact on the operation of the employer's pension plan." *Id.* at 1106-07. Pension plans are not self funding. Rather, funding is based upon expected long-term payouts to plan participants. Unbudgeted pension payments must be made up from the employer's general revenues or from the assets of the pension plan itself. Unfunded liability will have a tremendous economic impact on pension plans. Retroactive pension costs would have to be funded out of revenues beyond those expected when plan contributions were made.

The City of New York—in a brief filed jointly with EEAC in *Florida v. Long*, 487 U.S. 223 (1988)—indicated that additional, unbudgeted pension payment requirements "could only come from the discretionary portion of the budget, i.e., the monies allocated for the delivery of sanitation, fire-fighting, police and other uniformed services." Brief in Support of Petitioners at 21 n.9, *Florida v. Long*, 487 U.S. 223 (1988) (No. 86-1685). Moreover, the uncertain nature of financial markets makes it essential for plan administrators to protect existing commitments against unforeseen decreases in plan assets. Retroactive application would add to this already difficult burden.[4]

Another reason this Court declined to approve the retroactive award of damages in *Norris* was that employers had reasonably assumed that their pension programs were lawful even if they did not require

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[4] In any event, because the 1986 OBRA amendments require all employers to accrue benefits past normal retirement age, applying the amendments only prospectively does not hamper their purpose. *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1099-1100.

pension accruals after normal retirement age. 463 U.S. at 1106 (citing *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 720 (1978)). Similarly, in the instant case, to now impose a requirement on all employers to include pre-enactment service years when calculating accrued benefits will have a devastating effect on employers who—recognizing that such accruals were not required—did not fund their pension plans to provide for such accruals.

In *Norris*, this Court held, "There is no justification for this Court, particularly in view of the question left open in *Manhart*, to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only." 463 U.S. 1073 at 1107 (footnote omitted). Thus, the Ninth Circuit erred by failing to examine its imposition of retroactive relief for its effects on other retirement plans, the economy, and on innocent third parties.

II. IF AFFIRMED, THE NINTH CIRCUIT'S DECISION WILL HAMPER THE USE OF EARLY RETIREMENT INCENTIVE PROGRAMS AND RELEASES CONTRARY TO THE INTENT OF CONGRESS

A. The Older Workers Benefit Protection Act Expressly Recognizes that an Employer May Obtain a Release or Waiver in Connection with an Exit Incentive or Other Employment Termination Program

The Ninth Circuit held that Lockheed acted in violation of ERISA by amending the Plan to condition eligibility for enhanced retirement benefits on a release of claims. ERISA is a statute which governs the administration of employer-provided benefit plans. 29 U.S.C. § 1003. ERISA does not, however, directly address the ability of an employer to obtain a release

as a prerequisite to offering an exit incentive or other employment termination program. Nonetheless, the effect of the ruling below will be an inhibition on the use of exit incentive programs and releases. This result is contrary to Congressional intent in the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (1990) (OWBPA), the statute that recognizes Congressional approval of early retirement incentive programs and specifically sanctions the ability of employers to obtain a release in exchange for an exit incentive or other employment termination program.

In *Public Employees Retirement System v. Betts*, this Court held that employee benefit plans were excepted from ADEA. 492 U.S. 158 (1989). In response, Congress enacted OWBPA, which amended ADEA. OWBPA is a remedial statute intended both to emphasize ADEA's application to benefit plans and to ensure the ability of older workers to enjoy early retirement incentive programs without fear of age discrimination.

Through Title II of OWBPA, Congress reaffirmed the ability of employers to rely on "knowing and voluntary" waivers under ADEA. § 201, 104 Stat. at 983. As a safeguard to protect the interests of older workers, OWBPA created a series of protections for employers to follow in order to verify that a waiver is knowing and voluntary.[5] Moreover,

[5] When a waiver or release is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees the process requires that (1) the waiver be part of a written agreement; (2) the waiver specifically refer to rights or claims arising under ADEA; (3) the employee may not waive rights or claims that may arise after the date the waiver is signed; (4) the employee waives rights or claims only in exchange for con-

OWBPA provides that in the event of any dispute over whether a waiver was knowing and voluntary, the party asserting the validity of the waiver has the burden of proving that each of the requirements was met. § 201, 104 Stat. at 983-84 (amending 29 U.S.C. § 626).

OWBPA's pasage affirms the validity of early retirement incentive programs. Indeed, the Statement of Managers [6] provides:

> We recognize that employees may welcome the opportunity to participate in such programs, and we do not intend to deprive employees of such opportunities or to deny employers the flexibility to offer such programs rather than resorting to involuntary layoffs.

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sideration in addition to anything of value to which the employee is already entitled; (5) the employee is advised in writing to consult with an attorney prior to signing the agreement; (6) the employee be given a period of 45 days during which to confer the agreement; (7) the employee be given at least 7 days to revoke the agreement; (8) the employer inform each employee in writing as to the class, unit, or group of employees covered by the program, any eligibility factors and any time limits applicable to the program; and (9) the employer inform each employee in writing as to the job titles and ages of all employees eligible or selected for the program and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. § 201, 104 Stat. at 983-84 (amending 29 U.S.C. § 626).

[6] OWBPA was the product of a compromise in the Senate that significantly modified the bill as previously reported by the Senate Labor and Human Resources Committee. The Statement of Managers had the effect of revising the prior legislative history.

136 Cong. Rec. S13,596 (daily ed. Sept. 24, 1990). Congress clearly intended OWBPA to provide a safe harbor for exit incentives:

> [OWBPA] grants a safe harbor for the two most common forms of exit incentives: Pension subsidies and Social Security bridge payments. According to the General Accounting Office, as many as two-thirds of the early retirement incentives offered by employers take one of these two forms. . . . This bill now immunizes from challenge two-thirds of the early retirement incentive programs offered by employers today.

136 Cong. Rec. S13,603 (daily ed. Sept. 24, 1990) (Statement of Sen. Pryor).

In July 1992, EEOC solicited public comment on certain provisions of OWBPA. 57 Fed. Reg. 10,626 (1992). In response, the principal authors of OWBPA [7] sent a letter which provided as follows:

> Congress intended this protective legislation to be liberally construed in order to effectuate the remedial purposes of prohibiting discrimination in the areas of employee benefits and providing safeguards for individuals who are asked to waive their rights under ADEA.

Thus, the principal authors of OWBPA affirmed the legitimacy of employers' use of "knowing and voluntary" waivers under ADEA. In direct contravention of the intent of OWBPA's principal authors, the Ninth Circuit's decision jeopardizes the ability of

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[7] The principal authors of OWBPA were Senator David Pryor (D-Arkansas), Senator Howard Metzenbaum (D-Ohio), Representative Matthew Martinez (D-California), Representative William L. Clay (D-Missouri), Representative Edward R. Roybal (D-California), and Representative William D. Ford (D-Michigan).

employees to receive additional benefits to which they would not otherwise be entitled in exchange for signing a release.

B. Employers May Cease to Offer Enhanced Benefits to Employees at All if They Are Denied the Ability to Obtain Releases

Like Lockheed, many employers who are faced with the necessity of workforce reductions offer generous severance benefits, far in excess of any to which employees otherwise would be legally entitled. These programs offer substantial financial benefits to employees. Some employers offer early retirement incentives and other voluntary termination programs in lieu of layoffs. Because employers voluntarily offer benefits in excess of those that they are legally obligated to provide, employers frequently require employees who choose to accept these additional benefits to execute a waiver of claims in return. In this manner, an employer buys a litigation-free future in exchange for awarding substantial extra benefits to employees.

OWBPA already places a significant administrative burden on employers who wish to secure releases in exchange for supplemental severance benefits. Congress was aware of this burden, but deemed it necessary in order to protect employees against the possibility of being coerced or misled into signing releases that were not truly knowing and voluntary.

The burden placed on employers who seek releases will be increased well beyond the level envisioned by Congress in OWBPA, however, if this Court adopts the Ninth Circuit's holding. If ERISA is construed to deny employers the ability to obtain releases, it

follows that many will cease offering enhanced severance benefits to their employees at all. Thus, many employers will conclude that the administrative burdens, risks and restrictions on obtaining releases simply outweigh any benefits they provide. The result will be that layoffs will still occur, but without the additional severance benefits offered in the past.

CONCLUSION

For the reasons stated herein, EEAC respectfully submits that the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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